

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 05-44481-rdd

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5 In the Matter of:

6

7 DPH HOLDINGS CORP, et al.,

8

9 Debtors.

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13 United States Bankruptcy Court

14 300 Quarropas Street

15 White Plains, New York

16

17 October 21, 2013

18 10:07 AM

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20 B E F O R E:

21 THE HONORABLE ROBERT D. DRAIN

22 U.S. BANKRUPTCY JUDGE

23

24

25 ECRO: A. VARGAS

1 HEARING re 22189: GM Cross Motion to Adjourn

2

3 HEARING re 22075: Reorganized Debtors' Motion for an Order to  
4 Compel Compliance with, and to Implement, the Modified Plan,  
5 Plan Modification Order and Related Documents

6

7 HEARING re Motion to Disallow Claims Reorganized Debtors Motion  
8 for Order (I) Enforcing Modification Procedures Order, Modified  
9 Plan and Plan Modification Order Injunction Against Curtis J.  
10 Duxbury and Carol Duxbury, as Plaintiffs, in New York State  
11 Court Personal Injury Action; and (II) Directing Curtis Duxbury  
12 and Carol Duxbury to Dismiss Action to Recover Upon Discharged  
13 and Expunged Claim ("Duxbury Injunction Motion")

14

15 HEARING re Motion for Order (I) Enforcing (A) Modified Plan and  
16 Plan Modification Order Injunctions, (B) OPEB Orders, and (C)  
17 Recoupment Order; (II) Enjoining James Sumpter's Second Lawsuit  
18 Filed in the USDC for the Southern District of Indiana and  
19 Requiring James Sumpter to Dismiss the Indiana Action with  
20 Prejudice; and (III) Holding James Sumpter in Contempt and  
21 Awarding Other Sanctions.

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25 Transcribed by: Theresa Pullan

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P R O C E E D I N G S

THE COURT: Please be seated. Good morning. In re  
DPH Holdings.

MR. BERGER: Good morning, Judge, Neil Berger of  
Togut, Segal & Segal, and joined today by my colleague, Steve  
Flores. My client, John Brooks, who is the president of DPH is  
here with us today.

There are a number of matters on the calendar, Your  
Honor. Four -- three of them are resolved. And if I can, Your  
Honor, I think it would make sense to take numbers 1, 2 and 4.  
Number 1 is the new GM motion, cross motion for an adjournment.  
Number 2 is my client's, the reorganized debtor's motion to  
compel. And number 4 --

THE COURT: Which is related to the GM.

MR. BERGER: Yes, Judge,

THE COURT: Right.

MR. BERGER: And number 4 is the papers for what we  
call the Duxbury injunction motion. You'll hear in a moment  
that that's been resolved, and we've consulted with our friends  
at King & Spalding who are here today, Arthur Steinberg and  
Scott Davidson concerning that settlement. And in a moment  
I'll talk to you about how the exhibit to our proposed  
settlement agreement has been revised to account for that  
settlement.

THE COURT: That's not the Duxbury one, that's the GM

1 one.

2 MR. BERGER: Duxbury is resolved as well.

3 THE COURT: Okay. All right.

4 MR. SCHOONMAKER: Your Honor, this is Wayne  
5 Schoonmaker. I'm appearing on behalf of the Duxbury --

6 THE COURT: All right. But you said King & Spalding,  
7 but that's the GM.

8 MR. BERGER: King & Spalding representing new GM.

9 THE COURT: Yeah, but I, I thought you were referring  
10 to them in connection with the Duxbury one. That's a different  
11 counsel.

12 MR. BERGER: No, no, I did refer to them in  
13 connection with Duxbury because as Your Honor may recall --

14 THE COURT: Well there's a tie-in to GM in the  
15 Duxbury one.

16 MR. BERGER: Yes.

17 THE COURT: Right, okay.

18 MR. BERGER: Yes, so we consulted with them over the  
19 weekend.

20 THE COURT: All right. Okay.

21 MR. BERGER: Your Honor, first on the calendar is  
22 the, is the GM cross motion to adjourn found at document  
23 number, docket number 22189. That's resolved as part of the  
24 larger settlement that we have on the debtors' motion to compel  
25 found at docket number 22075.

1 THE COURT: Okay.

2 MR. BERGER: Your Honor, we've been negotiating with  
3 GM, and I'll refer to GM as new GM, over the last four months  
4 concerning the debtors' motion to compel. On Friday we  
5 contacted chambers to advise that the parties have reached a  
6 partial resolution concerning the funding request. Your Honor  
7 may recall that the funding agreement that's part of the master  
8 disposition agreement is at the heart of that dispute. We've  
9 entered into a stipulation that reflects the parties'  
10 resolution. We sent to chambers an unredacted and a redacted  
11 version of that stipulation. It recites the parties'  
12 agreements, at least as many of the issues that we were able to  
13 resolve so far. And it also constitutes the parties' joint  
14 request that portions of the settlement agreement be redacted.

15 Your Honor, I know that this is a consensual  
16 resolution that we presented to you, but if I may, I have a  
17 very short proffer for Mr. Brooks who is in the courtroom  
18 today.

19 THE COURT: Okay.

20 MR. BERGER: Thank you, Judge.

21 If called to testify, John Brooks would testify that  
22 he has served as president of DPH Holdings Corp. on behalf of  
23 itself and each of its subsidiaries in their capacities of  
24 reorganized debtors since October 6th, 2009.

25 He would testify that he is familiar with the

1 reorganized debtors' motion to compel, and the responses that  
2 have been filed by new GM and the reorganized debtors in  
3 connection with that motion.

4 Mr. Brooks would also testify that he's familiar with  
5 the funding agreement that is at the center of the parties'  
6 disputes and that he's participated in the negotiations between  
7 the reorganized debtors and new GM since that motion to compel  
8 was filed on July 3rd, 2013.

9 Mr. Brooks would testify that the partial settlement  
10 that's set forth in the proposed stipulation and order  
11 represents the culmination of extensive negotiations between  
12 the parties that occurred since the motion was filed.

13 He would also testify without waiving any rights,  
14 claims or defenses in favor of the reorganized debtors that  
15 litigation of the rights and assertions that are resolved by  
16 the proposed stipulation would have been costly, could have  
17 caused delay in the reorganized debtors' efforts to close these  
18 cases, and that there was at least some risk concerning the  
19 outcome of that litigation. Consequently, the proposed  
20 settlement represents the compromise of contested claims and  
21 assertions.

22 He would testify that the stipulation represents a  
23 significant achievement in the reorganized debtors' steps to  
24 close these cases.

25 He would further testify that the reorganized



1 debtors' agreement in the stipulation represent an exercise of  
2 his considered business judgment taking into consideration the  
3 parties' litigation positions and other circumstances.

4 Finally, Mr. Brooks would testify that certain  
5 portions of the proposed stipulation contain confidential  
6 commercial information, the disclosure of which would cause the  
7 reorganized debtors and new GM commercial injury by adversely  
8 impacting the reorganized debtors' ability to finalize  
9 negotiations of outstanding claims. Accordingly, he requests  
10 on behalf of the reorganized debtors that as part of the  
11 approval of the stipulation, the Court authorize and order the  
12 redaction of the confidential information that is contained in  
13 the stipulation and which was redacted in the proposed  
14 stipulation and order that we provided to chambers.

15 That, Your Honor, is the sum of Mr. Brooks's proffer.  
16 If I ask, if I may ask, Your Honor, Mr. Brooks to stand and  
17 confirm to Your Honor his identity and confirm that that in  
18 fact would have been his testimony.

19 THE COURT: Okay.

20 MR. BROOKS: It would be.

21 THE COURT: Okay. Does anyone want to cross-examine  
22 Mr. Brooks on his proffer? All right. I don't have any  
23 questions of him either.

24 MR. BERGER: Thank you, Your Honor.

25 THE COURT: So I'll accept that proffer.

1 MR. BERGER: That is the end of his proffer. And  
2 with that, I think that Mr. Steinberg may have a short  
3 statement for the Court.

4 THE COURT: Okay.

5 MR. STEINBERG: Good morning, Your Honor.

6 THE COURT: Good morning.

7 MR. STEINBERG: I think you can see that the  
8 stipulation reflects that the parties put down in writing what  
9 they could agree to at this point in time, and essentially  
10 kicked the can down the road to the next omnibus day for those  
11 issues that have not, capable of full resolution at this point  
12 in time. I think the good news is that if there's a  
13 contemplated settlement of the environmental claims, the  
14 funding that new GM has agreed to will be able to deal with  
15 that contemplated settlement, and that is by far the largest  
16 amount that was underlying the funding dispute.

17 Everything else that is left is relatively small  
18 compared to it. And although the stipulation has a number of  
19 settlements that have been agreed to and discussed what the  
20 funding was, there are a couple of settlements, there are a  
21 handful that have not been resolved yet. The benefit of  
22 kicking the can down the road with the finality of the December  
23 31 funding date, there is pressure on both the plaintiff and  
24 defendants in those litigations to come to resolution. And as  
25 we go from the projection to the reality in all likelihood

1 there will not be disputes related to that either. But because  
2 we're not there yet --

3 THE COURT: So in other words, the parties, GM and  
4 the debtor, particularly GM, are closely monitoring the  
5 remaining status of the claim litigation.

6 MR. STEINBERG: Closely monitoring the remaining.  
7 And when we say the claim litigations, these are litigations  
8 where people have actually not filed a claim in the case, but  
9 they, the litigations that were commenced after the case went  
10 effective.

11 THE COURT: Right.

12 MR. STEINBERG: And we are, we are familiar enough to  
13 understand what we think the ranges are, we've listened to what  
14 the debtor has said about what the range of resolutions are.  
15 And what we're more closely monitoring is the process upon  
16 which they will come to a conclusion because that's the thing  
17 that we're most emphasizing which is to conclude this matter  
18 before the end of the year. So I think, Your Honor, the  
19 stipulation is a good result for now, we'll see where we are no  
20 November 14th. I'm fairly confident that we will be able to do  
21 something further on November 14th on a consensual basis, but  
22 the proof will be in the pudding as we get closer to that date.

23 THE COURT: Okay. Very well.

24 MR. BERGER: Judge, just to confirm and to respond to  
25 Your Honor's inquiry, we do speak frequently about those state

1 court claims.

2 Your Honor, that is our presentation concerning the  
3 proposed stipulation. One change was made over the weekend.  
4 The Duxbury matter was resolved, new GM agreed to cover the  
5 funding for that settlement. The sole change that was made to  
6 the stipulation was adding a dollar figure for the Duxbury  
7 matter and having it redacted in the redacted version. So that  
8 is our presentation concerning matter 2, the motion to compel.  
9 That also resolves obviously number 1 which is the GM motion,  
10 cross motion for adjournment. Before we close on this  
11 stipulation, I think it would be helpful for my co-counsel to  
12 speak about the Duxbury matter.

13 THE COURT: Okay.

14 MS. HAFLEY: Good morning, Your Honor.

15 THE COURT: Good morning.

16 MS. HAFLEY: This is Cynthia Haffey representing the  
17 reorganized debtors. And the Duxbury matter has been resolved  
18 in principal. We are adjourning the matter until the next  
19 omnibus hearing with every expectation that we'll be  
20 withdrawing the motion before that hearing, but the actual  
21 settlement hasn't been papered yet.

22 THE COURT: Okay. All right.

23 MS. HAFLEY: I think --

24 THE COURT: Well I will -- I'm sorry to interrupt  
25 you.

1 MS. HAFLEY: I was just going to say counsel for the  
2 Duxburys is on the line and probably would like to speak at  
3 this time.

4 THE COURT: Okay.

5 MR. SCHOONMAKER: Yes, Your Honor, this is Wayne  
6 Schoonmaker, I'm the attorney for Duxbury. And yes it's my  
7 understanding, I had numerous conversations on Friday with Mr.  
8 Radom and we have an agreement in principal to settle the  
9 matter. It was my understanding that we would adjourn it until  
10 the next hearing date assuming that we can work out whatever  
11 logistics need to be worked out.

12 THE COURT: Okay. And I'm assuming the same, the  
13 same intention with keeping things on hold in the state court  
14 too.

15 MR. SCHOONMAKER: Yes, yes, we're not going -- other  
16 than perhaps proceeding because there are two other parties,  
17 two other defendants in the Duxbury case. We may proceed  
18 against them, but we intend to take no action at this point  
19 with respect to the reorganized debtor.

20 THE COURT: Okay.

21 MR. BERGER: If I may, just one clarifying point.  
22 Counsel for new GM is correct. My words were imprecise, they  
23 haven't agreed to fund Duxbury, the agreement is that the  
24 Duxbury settlement is included in the wind up budget. There is  
25 a function of how that funding agreement operates.

1 THE COURT: Okay. All right. I will approve the  
2 reorganized debtors' entry in to the settlement agreement which  
3 is a partial settlement with new GM, and as a subset of that, I  
4 approve the request to redact on the public record portions of  
5 that settlement agreement which is consistent with the prior  
6 orders I've entered in this case going back to 2009. And I  
7 agree with Mr. Brooks's proffer that it's a proper exercise of  
8 the debtors' business judgment and reasonable. So I guess you  
9 need to email chambers of the final version of that.

10 MR. BERGER: I have them on disk.

11 THE COURT: Okay. You can hand those over to Ms.  
12 DiSalvo.

13 MR. BERGER: Thank you.

14 THE COURT: Is there a separate order on the 107(b)  
15 relief?

16 MR. BERGER: No, it's built into the stipulation  
17 [indiscernible].

18 THE COURT: Okay. That's fine.

19 MR. BERGER: And I have, Your Honor -- sorry, it's  
20 Neil Berger speaking, I have a redacted form on diskette and a  
21 separate diskette unredacted so Your Honor can see the changes.

22 THE COURT: Right. Okay.

23 MR. BERGER: Your Honor, that takes care of items  
24 number 1, 2 and 4. And I'll cede the podium to my co counsel.

25 THE COURT: All right. Well, for the people who are

1 here either in person or on the phone on those items who don't  
2 want to stay, you're certainly free to go.

3 MR. SCHOONMAKER: Thank you very much, Your Honor.

4 THE COURT: Okay.

5 MS. HAFLEY: I'll wait until the Court is ready.

6 THE COURT: That's okay, go ahead, it's fine.

7 MS. HAFLEY: Good morning, Your Honor, this is  
8 Cynthia Haffey, and if I may, I would like to address the Court  
9 from counsel table rather than the podium because I have  
10 certain documents spread out here.

11 THE COURT: Sure.

12 MS. HAFLEY: Your Honor, this is the continuation of  
13 the reorganized debtors' motion to enjoin Mr. Sumpter's latest  
14 Indiana action. We were before this Court approximately a  
15 month ago and the Court asked the parties to do a couple of  
16 things, and that was to provide it with additional references  
17 or evidence that disability benefits were before the Court and  
18 understood by the parties to be part of the salaried OPEB  
19 termination motion, as well as address the legal question of  
20 collateral estoppel and this Court's jurisdiction.

21 So in our supplemental memorandum we did that, Your  
22 Honor, and I'm going to address the first question and that is  
23 in regards to additional references, citations, evidence that  
24 disability benefits were before this Court. And I think, Your  
25 Honor, it starts with an understanding that what was before the

1 Court at the time was whether benefits were vested in the  
2 Delphi plan. So what the argument before the Court dealt with  
3 was the reservation of rights provision in the three different  
4 benefit plans. Disability benefits was just one of those  
5 benefits within those plans.

6 So the parties looked at the question as to whether  
7 that reservation of rights provision was a provision that  
8 allowed DPH, the reorganized debtors, and prior to, Delphi, to  
9 be able to alter or modify or terminate those plans. And this  
10 Court did find that those, that language did permit the  
11 reorganized debtors to do that, that it was an at-will  
12 reservation provision. And to show that the parties on both  
13 sides understood that that was the focus, we have cited in our  
14 memorandum several excerpts from the transcript. In the  
15 February 24th transcript, Mr. Gloster, who was at that time an  
16 attorney for some of the objectors and then later an attorney  
17 for the 1114 committee, argued to the Court that he felt the  
18 reorganized debtors had a burden of presenting evidence of more  
19 than just, he said, four benefits but all of the benefits.

20 THE COURT: This was at the February hearing.

21 MS. HAFLEY: This is at the February hearing.

22 Correct. And specifically identified retirees with disability  
23 benefits as a category that should warrant additional  
24 attention. And the attention at that time was to the benefits  
25 that had the greatest costs to the reorganized debtors. When



1 this Court asked Mr. Gloster, well do you have any facts to  
2 support that people who retired on full disability had a  
3 separate promise, some other benefit plan or some other  
4 promise, Mr. Gloster had to concede that there was not. And  
5 that was in February.

6 THE COURT: Although that, I think to be fair, one of  
7 the reasons that I appointed the committee and gave him the  
8 charge of looking at this issue was to explore that very issue.

9 MS. HAFLEY: And I do not disagree with that, Your  
10 Honor. And you will find later on in what we presented to the  
11 Court that there wasn't any evidence presented through the 1114  
12 committee at the March 11th hearing either that demonstrated  
13 that. During that same hearing, Mr. Butler also clarified that  
14 it was the debtors' benefit plans that contained the  
15 reservation of rights provision. And during this colloquy that  
16 he had with the Court, individuals receiving disability  
17 benefits was again used as an example.

18 During the testimony of Mr. Gebbia (phonetic) who at  
19 that time was employed with new Delphi and had been Delphi's  
20 executive director of benefits and policy, he described the  
21 benefit coverage under the plans, and again used disability  
22 benefits as an example. So the 1114 committee, we believe,  
23 Your Honor, understood that their charge included disability  
24 benefits, specifically because this Court stated at the  
25 February 24th hearing that the purpose of the committee was to

1 determinate "whether any group such as for example those  
2 retired on disability would have vested rights." And that's at  
3 page 123, lines 8 through 17 of the February 24th transcript.

4 So, following the formation of the committee, this  
5 Court then held a second hearing on March 11th. The committee  
6 did file a report and attached to it several exhibits. When  
7 providing an overview of the committee's report, Mr. Butler  
8 again talked about the fact that these were the benefit plans  
9 in which the benefits were contained, that there weren't 17  
10 different plans to have 17 different benefits. But there were  
11 just these benefit plans that they were talking about and they  
12 were the three benefit plans that were laid out in footnote 1  
13 of the termination motion.

14 At the end of that hearing, this Court made several  
15 rulings that found that the, all of Delphi's benefit plans  
16 contained a clear and unambiguous reservation of rights to  
17 terminate.

18 THE COURT: Just to be clear, it's footnote 3 of the  
19 motion.

20 MS. HAFLEY: Is it? Thank you.

21 THE COURT: I'm sorry, go ahead.

22 MS. HAFLEY: This Court stated that all of Delphi's  
23 benefit plans contained a clear and unambiguous reservation of  
24 the right to terminate, and that the debtors had met their  
25 burden. And again notably this Court went on to state that in

1 light of the debtors having met their burden and in the absence  
2 of any other evidence and other particular group -- and again  
3 this Court uses an example, people on disability -- that there  
4 hadn't be any evidence that anybody should be excluded from  
5 your order.

6 The 1114 committee's report that was presented to the  
7 Court before the March 11th hearing I think is notable. On  
8 page 23 and page 26, they expressly call out certain provisions  
9 to try to show that certain benefits were vested. And on page  
10 23, they call out monthly total and permanent disability  
11 benefit payments. And on page 26, again, they call out  
12 disability income and payments under the disability benefits.

13 And lastly, they attach exhibits A, B and C to their  
14 motion. So we believe, Your Honor, that when looking at the  
15 hearing transcripts in total when looking at the motion and  
16 looking at the briefs that were presented to this Court, that  
17 it was clear that all the parties understood at that time that  
18 disability benefits were contemplated and were part of the  
19 termination motion.

20 I do want to, next, Your Honor, turn to Mr. Sumpter's  
21 complaint in this action because it deals with the final OPEB  
22 order. And Mr. Sumpter in his complaint in Indiana states and  
23 his causes of action either expressly say or derive expressly  
24 from that order, and he says that paragraph 4 of your final  
25 OPEB order, orders that, or holds that disability benefits are

1 vested benefits, that this is what that, that is what this  
2 Court found, and that the reorganized debtors are required  
3 under the order to continue to provide him benefits until the  
4 age of 65. There is no reading of paragraph 4 that one can  
5 find an interpretation. But rather than my just reading it and  
6 telling the Court that, we looked at the hearing transcripts to  
7 see is there any reference in the transcript of paragraph 4 to  
8 support that. And of course there is, Your Honor.

9 And I'm going to start with the March transcript  
10 first. And on page, and I apologize, this isn't cited in my  
11 brief, Your Honor, it's on page 100 and 101 of, excuse me, I  
12 take that back, it's on page 52 of the March 11th order where  
13 Mr. Butler says to the Court, the other provision that's not in  
14 here, which Your Honor we propose to add, is a new paragraph 4.  
15 And he goes on and tells the Court that the issue had come up  
16 in the prior hearing with Mr. Rosenberg, and he said "and I  
17 spoke about before the Court with the Court and at the last  
18 hearing with Mr. Rosenberg and it dawned on me late last night  
19 that we hadn't actually got anything in writing about this yet,  
20 so we proposed to put in paragraph 4." And then he cites  
21 paragraph 4. And he says "so that's what that says, and  
22 therefore people don't have to go through the claims process."

23 Admittedly I wasn't entirely certain as to what Mr.  
24 Butler was talking about here so I turned to the February 24th  
25 hearing for clarification. And on page 100, Mr. Rosenberg is

1 addressing the Court, and he says that, on page 100, that he is  
2 concerned that if this order is entered by the Court and the  
3 benefits are terminated, and at that time there was a  
4 contemplation that benefits would be terminated in April, that  
5 individuals that had medical expenses and would fall through  
6 this, you know, period in time between the time that they had a  
7 medical expense, they went to the doctor and have a bill to  
8 submit, and the order is entered and they haven't yet submitted  
9 the bill to get, provided under their benefits that somehow  
10 they would fall through the crack and that bill wouldn't get  
11 paid. And he wanted to make certain that those individuals  
12 could submit those bills and that they wouldn't have to go  
13 through the claims procedure. And the reorganized debtors  
14 ultimately agreed to that and that's what paragraph 4 is about.

15 So Mr. Sumpter in his complaint again states  
16 expressly in several of the causes of action that we, that the  
17 reorganized debtors are required under paragraph 4 to continue  
18 to pay him benefits and that disability benefits were vested.  
19 And as the transcript makes clear, that is not at all what  
20 paragraph 4 entails.

21 Lastly, Your Honor, and I can see the Court is  
22 looking for something, so if you'd like me to wait I will.

23 THE COURT: No, go ahead that's fine.

24 MS. HAFLEY: Lastly, Your Honor, we did provide the  
25 Court with some case law which we think is real illustrative as

1 to whether this Court can either on the basis of res judicata  
2 or on collateral estoppel find that Mr. Sumpter's Indiana  
3 motion is enjoined.

4 The Texaco case I think, Your Honor, is right on  
5 point. And it is this Court's decision that was then affirmed  
6 by the District Court and the court of, the Second Circuit  
7 where there was an issue as to whether contamination to  
8 property was a post-confirmation issue or a pre-confirmation  
9 issue on whether the Court had jurisdiction. And the Court  
10 found that the contamination to the property actually happened  
11 pre-confirmation and that therefore the Court had jurisdiction.  
12 The situation is the same here, Your Honor. We have a benefit  
13 plan in which this Court found the reservation of rights  
14 provision was a provision that has allowed the reorganized  
15 debtors to alter, modify at will the benefits under it.  
16 Therefore, they weren't vested benefits. That, those benefit  
17 plans, that provision didn't change pre-confirmation or post-  
18 confirmation.

19 The action to actually then terminate happened post-  
20 confirmation, but the benefit plan provision and the benefit  
21 plans themselves didn't change. They were the same benefits  
22 pre- and post-confirmation. So I think Texaco, Your Honor, is  
23 real illustrative, and that the Court then when it entered its  
24 modified plan and the injunction order and provisions in that  
25 plan then provides this Court with a basis for res judicata.

1                   Lastly, we provide the --

2                   THE COURT: And that's basically paragraph 13 or  
3                   section 13 of the plan, which says the Court retains exclusive  
4                   jurisdiction of all matters arising out of and related to the  
5                   chapter 11 cases in this plan including, skipping some text,  
6                   among other things, any dispute relating to any liability  
7                   arising out of the termination of any employee or retiree  
8                   benefit program regardless of whether such termination occurred  
9                   prior to or after the effective date.

10                  MS. HAFLEY: That's exactly right, Your Honor.

11                  THE COURT: And then there's an injunction to support  
12                  the actions taken.

13                  MS. HAFLEY: That's correct.

14                  THE COURT: What specific injunction covers this  
15                  besides protecting the employees and officers in acting in  
16                  accordance with the Court's order? What specific injunction  
17                  language pertains to Mr. Sumpter's Indiana action?

18                  MS. HAFLEY: The fact that this is, Mr. Sumpter's  
19                  Indiana action directly relates expressly in his complaint to  
20                  this Court's final OPEB order.

21                  THE COURT: Okay.

22                  MS. HAFLEY: And the termination of the benefit plan.

23                  THE COURT: Okay. Because you assert that order  
24                  authorized the debtors to terminate the plans.

25                  MS. HAFLEY: Yes. We assert that Mr. Sumpter --

1 THE COURT: I know, I understand. But that would be  
2 res judicata.

3 MS. HAFLEY: That's correct.

4 THE COURT: Because that would be on the theory that  
5 the OPEB order directly authorized the plan to be terminated  
6 with respect to these benefits. If it's just collateral  
7 estoppel, i.e., the issue is decided, but the order didn't  
8 actually, the issue is decided being subsumed within the relief  
9 that was sought or there was, of necessity a ruling on this  
10 issue to get to the OPEB order, but that the OPEB order didn't  
11 specifically grant the debtors the authority to terminate this  
12 aspect of the plan, where would the injunction be?

13 MS. HAFLEY: Where would the injunction be? The  
14 injunction --

15 THE COURT: Maybe I'm not being clear. And this goes  
16 to the distinction between collateral estoppel and res  
17 judicata. Assume for the moment, I'm not asking you to agree  
18 with this, but assume for the moment that the final OPEB order  
19 from March 11th, 2009 authorized the debtors to terminate only  
20 specific portions of the life insurance and disability plan  
21 that do not include the disability portion, just assume that  
22 for the moment.

23 MS. HAFLEY: Okay.

24 THE COURT: Assume also for the moment that to get to  
25 that point, the Court ruled that there really was no exception



1 in the plan to the right to terminate including for any other  
2 disability payment. To me there's a distinction there. Res  
3 judicata would apply to the specific order which authorized  
4 termination of -- again, I'm not asking you to accept this, but  
5 just hypothetically -- termination of specific aspects of the  
6 life and disability plan. But collateral estoppel would apply  
7 because I in essence found that there's no exception for  
8 disability at all. So now turn to the plan modification order  
9 and the plan. There's an injunction in the plan modification  
10 order that enforces the injunction in the plan, and this is  
11 different than the jurisdiction point which we've already  
12 talked about, section 13. What aspect of the injunction would  
13 apply to Mr. Sumpter's Indiana action if the Indiana action is  
14 barred only because of collateral estoppel as opposed to a  
15 previous order that I entered?

16 MS. HAFLEY: I want to make sure I'm understanding  
17 the Court. You're asking what section of the plan modification  
18 order or what --

19 THE COURT: Yeah, the injunction, the injunction  
20 provision.

21 MS. HAFLEY: Other than the injunction provision,  
22 you're asking.

23 THE COURT: No, what part of the injunction, I really  
24 want to turn to the injunction provision, why don't we do it  
25 that way?

1 MS. HAFLEY: Okay.

2 THE COURT: And I'm looking in the exhibit book for  
3 it, for the plan modification order. But if you can point it  
4 to me faster, that would be great. I thought I had it here,  
5 but I'm not sure I do.

6 MS. HAFLEY: Well of course, there's the section  
7 11.11, the exculpation and limitation of liability provision,  
8 Your Honor.

9 THE COURT: Okay. Let me just -- are you reading  
10 from your exhibit book? I'm just looking, I'm just trying --

11 MS. HAFLEY: Are you looking for the modified plan,  
12 Your Honor?

13 THE COURT: I'm looking for the plan modification  
14 order.

15 MS. HAFLEY: The order.

16 THE COURT: Yes.

17 MS. HAFLEY: It is, the modification procedures order  
18 is JJ, volume III.

19 THE COURT: I got it.

20 UNIDENTIFIED: Is it the procedures order or the plan  
21 modification order?

22 MS. HAFLEY: I'm sorry. I think I pointed you in the  
23 wrong direction, Your Honor.

24 THE COURT: Well, it's not JJ? It's not.

25 MS. HAFLEY: Let's see where it's cited in the

1 motion.

2 [attorneys speaking off record]

3 MS. HAFLEY: Your Honor, I have the plan modification  
4 order but not in the binder. I would be happy to provide it to  
5 the Court.

6 THE COURT: Okay. I'd appreciate that. Thank you.

7 MS. HAFLEY: Looks like it's my only copy.

8 THE COURT: Let me take a quick look at it. And this  
9 is the July 30, 2009 order that is effectively the confirmation  
10 order, including the modified plan. We had another binder that  
11 was still on my desk. So --

12 MS. HAFLEY: So on paragraph 22, of course, Your  
13 Honor, the plan modification order is the provision enjoining,  
14 precluding and permanently enjoining on the effective date any  
15 claim or continuum of any manner, action or proceeding. It's a  
16 very broad provision.

17 THE COURT: This is effectively, this is effectively,  
18 well this is the only real injunction in the plan; but -- I'm  
19 sorry, in the plan modification order. But the plan itself is  
20 approved in the modification order. In the plan in section 11,  
21 11.2 deals with the termination of benefits. And 11.11  
22 exculpates the employees in respect of that.

23 MS. HAFLEY: Right.

24 THE COURT: And now I'm going to beg your indulgence  
25 and ask if you can --

1 MS. HAFLEY: In paragraph 20 the plan modification  
2 order incorporates those sections of the plan.

3 THE COURT: Right. Right. So then, I'm looking for  
4 the plan itself, the exhibits. Rosemary, do you have the plan?  
5 Do you have the plan? The plan, the modified plan? Do you  
6 have a copy of paragraph 11, or section 11 of the plan?

7 MS. HAFLEY: I can give you my copy.

8 THE COURT: Okay. Okay, so 11.2 provides if the  
9 debtors are discharged of all claims among other things that  
10 arise from a termination of employment, a termination of any  
11 employee or retiree benefit program regardless of whether such  
12 termination occurred prior to or after the effective date. So,  
13 and then paragraph 11.11 exculpates and limits the liability  
14 of, among others, the debtors, the reorganized debtors and  
15 their members, officers, directors, employees, advisors,  
16 attorneys, etc., arising out of any employee benefit plan, and  
17 effectively enjoins claims brought against them for among other  
18 things related to any employee benefit plan.

19 So then going back to my question, I guess, if the  
20 express authority was not granted in the final OPEB order but  
21 as a matter of law, the final OPEB order would be collateral  
22 estoppel as to any remaining termination of a welfare plan.  
23 Your assertion is that the plan and the modified, the plan  
24 modification order, in addition to preserving the Court's  
25 jurisdiction to decide these issues also discharges any claims,

1 even if the actual termination occurred later.

2 MS. HAFLEY: That's correct, Your Honor.

3 THE COURT: Based on collateral estoppel.

4 MS. HAFLEY: That's correct, Your Honor. And those  
5 provisions and what was just discussed, what the Court just  
6 pointed out is in our original motion before this Court.

7 THE COURT: Right. And the Monarch case from the  
8 First Circuit relies on collateral estoppel as opposed to res  
9 judicata in saying this was really, this issue was already  
10 decided by the Bankruptcy Court.

11 MS. HAFLEY: That's correct. And said that the plan  
12 modification, or the order and the injunction provisions  
13 discharged.

14 THE COURT: Even though it wasn't the specific relief  
15 granted, it was necessarily litigated and decided.

16 MS. HAFLEY: That's correct.

17 THE COURT: And why is it, why was it necessarily,  
18 why was it actually litigated and necessarily decided? You're  
19 saying it's because there were no exceptions at all to the  
20 benefits.

21 MS. HAFLEY: That's right.

22 THE COURT: And the termination, the terminability of  
23 welfare benefits including any retiree benefits, because  
24 there's no specific exception.

25 MS. HAFLEY: That's right.

1 THE COURT: Okay.

2 MS. HAFLEY: Thank you, Your Honor.

3 THE COURT: All right. I know you listed potential  
4 witnesses you wanted to call, but are you just reserving those  
5 for rebuttal?

6 MS. HAFLEY: I'm going to let Mr. Sendek --

7 MR. SENDEK: Your Honor, the answer is possibly. We  
8 have two people that are --

9 THE CLERK: I'm sorry [indiscernible]

10 MR. SENDEK: I know, that's the instructions, I  
11 apologize. Bruce Sendek, for the reorganized debtors. We have  
12 two people present, one by telephone, that's Mr. Hogan and John  
13 Brooks is here in person. With respect to Mr. Brooks, we  
14 learned last week, maybe mid-week that Mr. Sumpter was trying  
15 to subpoena him. He didn't ask us to accept the subpoena, he  
16 just said he was going to try to subpoena him. We also knew  
17 that Mr. Brooks was out of the country, so, I mean out of  
18 state. His office is in Michigan, so that was unlikely. But  
19 nonetheless, Mr. Brooks is here, not as our witness. We may  
20 have questions for him depending on what Mr. Sumpter --

21 THE COURT: But he's made himself available if Mr.  
22 Sumpter wants to examine him.

23 MR. SENDEK: Exactly. And just by way of explanation  
24 why we wouldn't call him in chief is his duties as president of  
25 DPH began in October 2009, that's of course after the OPEB

1 motion was filed, after the, after the orders were entered.  
2 And Mr. Brooks has no personal knowledge of those proceedings.  
3 So that's --

4 THE COURT: Okay.

5 MR. SENDEK: That said, Mr. Hogan has also received a  
6 copy of what purported to be a subpoena. There is issues with  
7 that, but nonetheless I believe the Court is familiar with what  
8 transpired there, and Mr. Hogan is available to testify today  
9 and answer Mr. Sumpter's questions. And given that he is, I  
10 would proffer a brief direct of what Mr. Hogan would testify if  
11 he were here, and we were to ask him questions.

12 THE COURT: As your witness.

13 MR. SENDEK: As our witness.

14 THE COURT: Okay.

15 MR. SENDEK: And I'll be very brief with it, Your  
16 Honor.

17 THE COURT: All right.

18 MR. SENDEK: Mr. Hogan would testify that he is a  
19 partner with Skadden Arps located in their Chicago office.

20 THE COURT: Could you just state his full name so we  
21 have that for the record?

22 MR. SENDEK: Al Hogan, I believe it's Albert. Yes,  
23 Albert Hogan, III.

24 THE COURT: Okay.

25 MR. SENDEK: Mr. Hogan has been closely involved in

1 the Delphi bankruptcy case as counsel for the debtors since  
2 near the time of its inception. Mr. Hogan was part of the  
3 Skadden team that filed the OPEB termination motion on behalf  
4 of the debtors. Mr. Hogan was present in Court for the  
5 hearings on the termination motion in both February and March  
6 of 2009.

7 Mr. Hogan would further testify that the Delphi Life  
8 and Disability Benefit Programs for salaried employees was one  
9 of three plans the debtor sought authority to terminate. And  
10 in fact the debtors were seeking authority to terminate all  
11 welfare benefits and all groups of benefits that were housed  
12 under those plans.

13 That concludes the proffer, Your Honor. And I would  
14 ask Mr. Hogan who is on the line, who is on the telephone that  
15 --

16 THE COURT: Right. And I gave him specific  
17 permission to appear, to be examined by phone --

18 MR. SENDEK: Yes, Your Honor.

19 THE COURT: -- given his location and also given his  
20 status as a lawyer and officer of the Court. Credibility  
21 issues are less significant there.

22 MR. SENDEK: That was appreciated, Your Honor, thank  
23 you. And I would just ask Mr. Hogan if he would agree with the  
24 summary that I provided of his testimony were he to testify on  
25 direct.



1 MR. HOGAN: Judge, this is Al Hogan. First, I echo  
2 the appreciation for allowing the testimony to be taken  
3 telephonically. Yes, I agree with the proffer as Mr. Sendek  
4 recited it.

5 THE COURT: Okay.

6 MR. SENDEK: Thanks.

7 THE COURT: Okay. Mr. Sumpter?

8 MR. SUMPTER: It's a lot for me to retain what's  
9 going on this morning.

10 THE COURT: Sure.

11 MR. SUMPTER: I think first I'd like to say there's  
12 been a continual mischaracterization of my complaint, of my  
13 OPEB objection in that I don't assert that the Court found that  
14 disability benefits were vested during the hearing in February  
15 of 2009. And in my OPEB objection, I referred to the welfare  
16 benefits of health care, life insurance, etc. being protected  
17 because I was on disability. I didn't say that disability was  
18 vested. And I made those points clear in my supplementary  
19 response. Because it's just a mischaracterization in terms of  
20 what I alleged was a vested and not vested and who vested it.  
21 But my personal argument on vesting is, as we discussed at the  
22 last hearing, and I tried to go over it again in my  
23 supplemental response, was that disability benefits were under  
24 claimed, and [indiscernible] payment, and you know we cited  
25 certain examples about that. And I assert that's why they were

1 vested. But also I assert that disability benefits were not  
2 terminated by the OPEB order, and that the motion to terminate  
3 the OPEB benefits did not include disability benefits.

4 Secondly, Ms. Haffey made a reference to I think she  
5 said was paragraph 4, but I didn't try to find it, but in the  
6 OPEB order, which I know I've referenced a section of that  
7 numerous times.

8 THE COURT: Right. It is paragraph 4.

9 MR. SUMPTER: Okay. That says that the debtor shall  
10 pay benefits on the claim without having to submit a new proof  
11 of claim, that kind of thing.

12 THE COURT: Right.

13 MR. SUMPTER: And that, and she stated that that came  
14 out of a discussion with Mr. Rosenberg or something like that.  
15 But in fact, that came out of discussion with Mr. Dole  
16 (phonetic), you can find that on page 67 of the transcript and  
17 --

18 THE COURT: Which one? The March one or the February  
19 one?

20 MR. SUMPTER: I'm sorry, the February transcript.

21 THE COURT: I'm sorry, 60 what?

22 MR. SUMPTER: 7. And if you look at the bottom of  
23 page 67, this is where it references 1129(a)(13), and you and  
24 Mr. Dole actually had a discussion about the wording of that  
25 because Mr. Dole kind of misstated it at first. But ultimately

1 11 U.S.C., 1129(a)(13) I think is the foundation and genesis of  
2 that paragraph of your order in what was described as paragraph  
3 4.

4 THE COURT: How so? How do you contend it is? As I  
5 read it, he's basically saying that the plans might continue  
6 even if you determine not to terminate them.

7 MR. SUMPTER: No. He's saying, let me just read it  
8 here, then 1129(a)(13) says, the debtor is not obligated to  
9 provide -- let me see, well maybe I misread, got the wrong one.  
10 Let me flip to the next, and find the page. I'm lost without  
11 my computer.

12 THE COURT: Okay.

13 MR. SUMPTER: But I'll just have to try to summarize  
14 because I can't, I'm just not able to find it.

15 THE COURT: That's fine.

16 MR. SUMPTER: Mr. Dole tried to quote 11 U.S.C. 1129  
17 and you corrected him. But at the end, he was saying after you  
18 got agreement on what that meant, that for benefits that  
19 weren't terminated, that 11 U.S.C. 1129(a)(13) states that the  
20 debtor should pay them, and it went on somewhere on there it  
21 even says and the reason for that is because the debtor is  
22 supposedly well acknowledged, debts have been cured and so he  
23 has the money to pay it, and there's no -- and I'm paraphrasing  
24 -- but that was essentially the essence of it. And if I was I  
25 guess under a little less pressure I could find that. Oh, it

1 says, on 69, at least that part about the reason why is because  
2 everyone expects a successor reorganization including  
3 continuation of retiree benefits. In other words, if the  
4 debtor would contend to be economically able to provide those  
5 benefits post-effective date. So I guess if we go back on the  
6 page before that.

7 THE COURT: But I can tell you that I don't think  
8 that's right.

9 MR. SUMPTER: Okay.

10 THE COURT: He was trying to argue that there was  
11 really no authority to terminate these benefits under the  
12 Bankruptcy Code except under 1114, and that I should really  
13 look at this in the context of the eventual confirmation of a  
14 plan, which is where 1129(a)(13) comes into play.

15 MR. SUMPTER: Right.

16 THE COURT: And says basically unless you know it's  
17 been rejected under 1114 then you have to keep them in place.  
18 But I disagreed with that. And the final OPEB order reflects  
19 that disagreement. I concluded that the plan is as you take  
20 it, and if it's terminable by its own terms, then you don't  
21 need to go through the 1114 process and 1129(a)(13) isn't  
22 implicated. That's clearly how I ruled. And that's a final  
23 order. The Third Circuit overruled the lower courts that  
24 agreed with me in the Third Circuit, so there's a dispute among  
25 the courts as to, you know, those provisions. But I knew what

1 I was doing, I found that those provisions didn't apply here  
2 except obviously they applied to a plan. But if the plan  
3 itself, that is the welfare plan, was terminable by its own  
4 terms then there was really, you know, that Congress didn't  
5 create any additional right beyond the plan itself. So I don't  
6 think that's the origin of that provision, the paragraph 4 in  
7 the final OPEB order because the whole point of the final OPEB  
8 order was to let them be terminated.

9 MR. SUMPTER: Well if I can, if I can find my  
10 reference point later, I'll seek an opportunity to make it, if  
11 you'll allow it.

12 THE COURT: Okay.

13 MR. SUMPTER: But the other part of it is, as  
14 indicated earlier, we were supposed to go out and see if we  
15 could find additional evidence that supported --

16 THE COURT: Either side's position.

17 MR. SUMPTER: Exactly.

18 THE COURT: Right.

19 MR. SUMPTER: So in order to do that I issued, I  
20 attempted to issue three subpoenas actually. One was to Mr.  
21 Gloster, another was to Mr. Brooks, and another to Mr. Hogan.

22 THE COURT: Right.

23 MR. SUMPTER: And just for point of clarification  
24 because it seems to me that a couple of people interpreted that  
25 way including Mr. Gloster, as I understood the rules, I have to

1 send a notice of subpoena prior to actually trying to serve the  
2 subpoena. So, for example, when I FedEx that document to Mr.  
3 Gloster, it said, and if you look at the document he forwarded  
4 to you, it said notice of subpoena. I had a server actually  
5 trying to serve Mr. Gloster, and the feedback I -- I'm sorry,  
6 not Mr. Gloster, but Mr. Hogan -- and the feedback I got was  
7 that he sent a person down to meet the server and refused to  
8 come down and take it.

9 THE COURT: Well he's going to testify to that, so  
10 you don't have to worry about that.

11 MR. SUMPTER: I understand. Okay. I just wanted to  
12 say, I mean I actually, except for one error that Ms. Haffey  
13 pointed out that I didn't give her a copy of the subpoenas for  
14 the document request until she requested them, I mean I  
15 originally tried to follow the instructions on issuing a  
16 subpoena which meant I have to send a notice before I send the  
17 subpoena.

18 THE COURT: Okay.

19 MR. SUMPTER: That's kind of, I know it's a side  
20 issue, but what I wanted to do first was to go to this  
21 declaration by Steven Gebbia (phonetic). I'll summarize what I  
22 believe is in there. Mr. Gebbia stated that I think it was a  
23 strategy board for the time when Delphi asked him to put  
24 together an assessment regarding these benefit terminations --

25 THE COURT: This is the declaration filed in

1 connection with the OPEB motion?

2 MR. SUMPTER: Yes.

3 THE COURT: Right. Okay.

4 MR. SUMPTER: And so he provides a table and in the  
5 declaration that's on page 6, and that table calls out all the  
6 benefits that were terminated, but it does not call out  
7 disability benefits. And I've got to unfortunately, like I  
8 said I'm lost without my computer and I tried to set it up here  
9 in here and I will find it here in a second, and I'll ask to  
10 give me time, I stated here that Mr. Gebbia had listed all of  
11 the benefits that were being terminated, and he has a sentence  
12 in here that says, that's the extent of the OPEB benefits that  
13 they were attempting to terminate. And so if you --

14 THE COURT: Well I have his declaration, so that's  
15 okay.

16 MR. SUMPTER: Okay. So what I'm saying is that  
17 declaration listed the same benefits that were listed in the  
18 OPEB motion. But in that declaration, Mr. Gebbia states that  
19 those were, the OPEB definition included those items  
20 exclusively. I'm paraphrasing now, but that's what that  
21 declaration said. So I think that that's a significant  
22 indication that, that the debtor was not attempting to  
23 terminate disability benefits.

24 Additionally, Ms. Haffey has referred to I think the  
25 March 11 hearing where the attorneys for the 1114 committee

1 said that, and they were definitely arguing about the language  
2 of termination, that kind of thing, but they were arguing that  
3 benefits such as health care, life, etc., were not terminable  
4 because for disability recipients. They were not arguing that,  
5 I think they probably argued that disability benefits were  
6 vested, but they weren't answering that in the context that  
7 they thought that disability benefits were being terminated.  
8 They were saying that the health and life insurance benefits --

9 THE COURT: As they applied to retirees who were  
10 disabled.

11 MR. SUMPTER: Yes.

12 THE COURT: I understand that point you're making,  
13 and I think there's, that's a plausible interpretation of  
14 what's going on here. I guess my issue is I'm not sure whether  
15 legally the distinction matters if in fact I concluded that  
16 those people who are disabled weren't entitled to those  
17 benefits even though they were disabled and that would trigger  
18 their, the right to the benefit. Why wouldn't that ruling also  
19 extend to the other disability benefits?

20 MR. SUMPTER: Well those other benefits, such as  
21 health care, life insurance, those are benefits which I'll call  
22 future benefits, they were on the claim. That would be so that  
23 you know if I had an accident in 2014, if the health care  
24 benefits weren't terminated, then they would have covered the  
25 accident.



1 THE COURT: But the trigger for those benefits for  
2 someone who is on disability is the disability.

3 MR. SUMPTER: I'm sorry, say that once again?

4 THE COURT: If you're on disability, you know, before  
5 your, before you retire, the reason for your right to benefits  
6 generally under the plan, the life and disability plan, is the  
7 disability; that's what gets you your entitlement to X, Y and Z  
8 under the plan.

9 MR. SUMPTER: Exactly. But that's not a health care  
10 claim.

11 THE COURT: Well the, but health care and life were  
12 clearly covered by this. So I guess I don't see why there  
13 would be a distinction as a legal matter for other disability  
14 payments since it's the disability that triggers the right to  
15 health care and life in the future, just like it's the  
16 disability that triggers the right to disability payments in  
17 the future.

18 MR. SUMPTER: Well I think that's what, I think  
19 that's what, I think it was Mr. Cornell was trying to argue.  
20 But I agree the Court ruled against that. I believe the Court  
21 said that health care benefits or life benefits were, could be  
22 terminated. I mean I agree that that's what, but I don't think  
23 there was any discussion about whether disability benefits  
24 themselves, you know, the plans are separate except for the  
25 disability plan says that a disability recipient also gets life

1 insurance and also gets a Medicare supplement, and also gets  
2 health care. But those are I'll call them additional  
3 provisions of the disability plan. The primary disability is  
4 essentially wage replacement because I can't work.

5 THE COURT: But the same termination language applies  
6 for the whole plan.

7 MR. SUMPTER: Well that's the part that I don't agree  
8 with either. I know they reference that. The plan, they say  
9 they were going to modify the life and disability plan. And I  
10 submit they did in fact modify it when they terminated life  
11 insurance. They didn't terminate the entire plan, they  
12 modified it because they terminated life insurance, but they  
13 didn't terminate disability insurance.

14 THE COURT: Okay.

15 MR. SUMPTER: And so Mr. Hogan is on the phone, I  
16 don't know what the procedure is, Your Honor.

17 THE COURT: Well, you can -- I'll put him under oath  
18 and you can cross-examine him if you want to do that at this  
19 point.

20 MR. SUMPTER: Okay. All right.

21 THE COURT: Okay. Mr. Hogan, can you hear Mr.  
22 Sumpter?

23 MR. HOGAN: I can, Judge.

24 THE COURT: All right. So, let me put you under  
25 oath.

1 MR. ALBERT HOGAN, SWORN

2 THE COURT: So you can go ahead Mr. Sumpter.

3 CROSS EXAMINATION

4 BY MR. SUMPTER:

5 Q. Mr. Hogan, I have one of the documents that you supplied  
6 in response to my subpoena. And I don't know if this will be  
7 useful to you or not, but it has a Bates number 0052 at the  
8 bottom of the page. Is that something you have access to?

9 A. If you give me one second, I believe I can get that.

10 THE COURT: Can you read off the title of it?

11 MR. SUMPTER: It's really, it's an email.

12 THE COURT: Okay. Just give me the, just say the  
13 date of it.

14 MR. SUMPTER: The date is March 15th, 2009. It's an  
15 email from Mr. Gloster to Mr. Hogan.

16 THE COURT: Okay. Okay, so do you have a question on  
17 that one for Mr. Hogan?

18 THE WITNESS: Just one moment, I'm attempting to get  
19 that.

20 THE COURT: We didn't catch that.

21 MR. SUMPTER: I think that was just motion noise.

22 THE COURT: Okay. So this was provided to you in  
23 connection with the subpoena, documents provided.

24 MR. SUMPTER: Yes.

25 THE WITNESS: Okay, I have, I believe I have the

1 email that you're referencing, Mr. Sumpter.

2 THE COURT: Okay.

3 BY MR. SUMPTER:

4 Q. Okay, I'm not going to read the whole thing, but I want to  
5 get you to the point that I'm interested in. It says "Al,  
6 following up on our discussion," and then there's, below that  
7 paragraph there's a web link, and then below that is this  
8 sentence: "As we discussed please let me know what disability  
9 benefits if any the debtors are proposing to terminate or  
10 modify. My understanding is that the PBGC and applicable law  
11 provide that certain disability benefits are vested."

12 A. I see that.

13 Q. So, does that, do you have a recollection of receiving  
14 that email and a discussion that followed that between you and  
15 Mr. Gloster?

16 A. I don't. I don't recall specifically receiving this  
17 email. What I do recall discussing with Mr. Gloster with  
18 respect to disability benefits, and it's a vague recollection,  
19 but there were two points of discussion. One is Mr. Gloster at  
20 various points was asserting that under applicable ERISA law,  
21 certain aspects of the benefits may be vested. And I believe  
22 we maintained and I think concluded that that was not the case.  
23 The second aspect about disability benefits, which may not be  
24 responsive to this email, that I recall ultimately settling the  
25 retiree committee's appeal of the termination order, Delphi

1 paid certain amounts into a VEBA including a hardship fund and  
2 that hardship fund as I recall was to be administered by a  
3 retiree committee of some sort. Mr. Gloster explained to me  
4 that among other matters that the committee would consider  
5 participants with disabilities in determining how to dole out,  
6 if you will, that hardship fund. And those are vague  
7 recollections, but those were the two items I remembered  
8 discussing about disability benefits with Mr. Gloster.

9 MR. SUMPTER: Your Honor, and Mr. Hogan, I have a, as  
10 a part of the effort to find additional information, because  
11 one of the questions what was the committee thinking, so I  
12 have, because it's been emphasized to me that this was a  
13 client, attorney-client privileged documents between the  
14 committee, or among the committee and the attorneys, so I  
15 redacted the portions that weren't relevant here, but and I  
16 have to read this to you, into the Court and Mr. Hogan because  
17 you know not having copies to make available to him. But these  
18 are from the minutes. Dean spoke with Al Hogan by --

19 THE COURT: I'm sorry, can you just give the date?

20 MR. SUMPTER: I'm sorry, March 17. So this is just a  
21 couple of days after that other email that Mr. Gloster sent Mr.  
22 Hogan, and that was 2009, by the way. "Dean spoke with Al  
23 Hogan and was told that his intentions are as follows. A  
24 second deadline would be given to retirees of April 15th. The  
25 health care savings accounts were not funded and not an avenue

1 to draw from, that all accounts were at zero as of April 1."

2 That was one bullet. The next bullet: "disability supplements  
3 will not terminate unless it is a health care related payment."

4 BY MR. SUMPTER:

5 Q. Do you recall telling Mr. Gloster that, Mr. Hogan?

6 A. No, I don't, and as I hear it, I don't really even know  
7 what it means.

8 Q. So would you believe, you suggest it is not a factual  
9 representation that was given the committee about a  
10 conversation?

11 A. I can't speak to that document, Mr. Sumpter, I'm just  
12 saying I don't remember having that discussion with Mr.  
13 Gloster.

14 MR. SUMPTER: Well that's the extent of my questions  
15 for Mr. Hogan.

16 THE COURT: For Mr. Hogan?

17 MR. SUMPTER: Yes.

18 THE COURT: Okay, do you have any redirect?

19 MR. SENDEK: Just one, Mr. Hogan. This is Bruce  
20 Sendek speaking.

21 REDIRECT EXAMINATION

22 BY MR. SENDEK:

23 Q. The communications that Mr. Sumpter referenced were post  
24 entry of the order. Correct?

25 A. I think that is correct. I'm looking at the email that he

1 directed me to, that was March 15th, so yes, that was I believe  
2 after, certainly after the second hearing where Judge Drain  
3 made his ruling. Correct.

4 Q. And I know you don't, you don't recall or perhaps never  
5 saw the communication Mr. Sumpter just read, but it sounds as  
6 though there were communications that you may have had that  
7 were in connection with settlement discussions of an appeal.  
8 Is that correct?

9 A. That is correct.

10 Q. And is that what your communications with Mr. Gloster  
11 would have been about, post-entry of the OPEB order?

12 A. Without remembering, it's hard for me to answer, but that  
13 makes sense to me. I know that I did have any number of  
14 discussions with Mr. Gloster. Again, my recollection there is  
15 that we transition into discussing how to set up a VEBA, and  
16 how to do so to preserve a health care tax credit for the  
17 benefit of the retirees. I worked with Mr. Gloster to achieve  
18 that goal, and I had any number of discussions as to what  
19 Delphi would pay to fund a VEBA in settlement of the issue and  
20 in resolution of the appeal.

21 MR. SENDEK: Nothing more from me. Thank you.

22 THE COURT: Okay.

23 MR. SUMPTER: Can I have a follow-up question?

24 THE COURT: Sure, go ahead.

25 RECROSS EXAMINATION

1 BY MR. SUMPTER:

2 Q. The discussions on a VEBA, did they come about before or  
3 after there was a general agreement or a close agreement on how  
4 much money would be paid to the retirees not to pursue the  
5 appeal?

6 A. My recollection is that Mr. Gloster raised the idea of a  
7 VEBA and the health care tax credit very early in the  
8 proceedings, even before the order, maybe in connection with  
9 the first hearing. So I remember frankly Mr. Gloster raising  
10 that issue and helping us all understand the benefits of using  
11 a VEBA to fund certain health care expenses in connection with  
12 this health care tax credit. My recollection is the amounts  
13 that Delphi ultimately agreed to fund into a VEBA, I'm pretty  
14 sure those discussions all took place after the entry of the  
15 termination order. You know, there may have been some  
16 discussion about numbers before, but the real deal was cut  
17 after the termination order was entered and the appeal was  
18 being pursued, I believe.

19 MR. SUMPTER: That's all I have.

20 THE COURT: Okay. Mr. Hogan, I have a question for  
21 you. I just want to ask you whether in connection with  
22 negotiating the settlement of the appeal, there was any  
23 commitment by Delphi not to terminate any specific welfare  
24 benefits, including any disability benefits.

25 THE WITNESS: Judge, I don't remember. Frankly, I



1 don't remember much about the discussion, I certainly don't  
2 remember making any commitment along those lines. And I guess  
3 I would say that if such a commitment were made, I would  
4 certainly expect to see that in writing in some document.

5 THE COURT: I think I know the answer to this one,  
6 but do you recall any requests by the 1114 committee that  
7 Delphi carve out from its right to terminate benefits any  
8 particular benefit?

9 THE WITNESS: I don't. I don't recall them making  
10 that request, Judge. It's possible that they did, but that I  
11 just do not recall.

12 THE COURT: Okay. Any questions on that exchange?

13 MR. SUMPTER: No, I have no questions.

14 THE COURT: Okay. All right. So unless you, unless  
15 someone wants to reserve Mr. Hogan for any sort of rebuttal, I  
16 think he can sign off if he wants to.

17 MR. SENDEK: Nothing here, Your Honor.

18 THE COURT: Okay.

19 MR. SUMPTER: Nothing.

20 THE COURT: Okay. Thank you.

21 THE WITNESS: Thank you, Judge.

22 MR. SUMPTER: So, my, when I went through and found  
23 these, the point is when I went back and looked through the  
24 minutes, the genesis of the discussion on disability as you  
25 might imagine came from me in the 1114 committee, I was the

1 only disabled member.

2 THE COURT: Can I interrupt you just for a second?

3 MR. SUMPTER: Okay.

4 THE COURT: Do you have any other testimony you want  
5 to bring out, from Mr. Brooks, for example?

6 MR. SUMPTER: Well I can do --

7 THE COURT: You could point to other things in the  
8 record; I just, I had a sense that you were going more towards  
9 argument as opposed to evidence. So if you want to have him  
10 testify.

11 MR. SUMPTER: No, I think I still, at least what I  
12 think of is evidence, you might be able to correct me on that,  
13 but what I was going to try to do is talk about some of the  
14 other minutes and the communication.

15 THE COURT: Okay. Normally, although he is a  
16 representative of the company, so I guess he can listen to  
17 this, but generally I don't have the witnesses present when  
18 you're talking about the evidence.

19 MR. SUMPTER: Okay.

20 THE COURT: Because it might affect their testimony.  
21 But I don't know if you want to have Mr. Brooks testify after  
22 all. I don't know.

23 MR. SUMPTER: I do.

24 THE COURT: Okay.

25 MR. SUMPTER: I don't think that the questions I'm

1 going to ask Mr. Brooks --

2 THE COURT: Go to this.

3 MR. SUMPTER: Yes.

4 THE COURT: All right. Fine. Okay.

5 MR. SUMPTER: There was no discussion about  
6 disability until I wrote an email to the committee and  
7 specifically asked Mr. Gloster to research an issue. And the  
8 issue arose when we started talking about the potential that  
9 the pension would be terminated. And so I have another email,  
10 this was sent to the committee from Mr. Gloster, and again, I  
11 can delete everything that wasn't relevant. And this was on --

12 MR. SENDEK: Your Honor, before we continue, I really  
13 do need to make an objection as to -- excuse me, Your Honor, I  
14 really do need to make an objection as to hearsay. I mean Mr.  
15 Gloster is not here.

16 THE COURT: This is, there was no objection when you  
17 talked about the emails with Mr. Hogan because you were just  
18 offering it to refresh his recollection, you weren't  
19 introducing it into evidence.

20 MR. SUMPTER: Okay.

21 THE COURT: I don't know, you're now, this is your  
22 testimony now? I'm just trying to figure out --

23 MR. SUMPTER: Yes, this is my testimony.

24 THE COURT: Well --

25 MR. SUMPTER: I also thought, well I would have, I

1 guess I have to apologize for not being really familiar with  
2 the procedures in Court.

3 THE COURT: That's fine, you're representing  
4 yourself, and it's always awkward when the witness is  
5 representing himself or herself. The way I handle it generally  
6 is I put that person under oath if it's now their testimony so  
7 they know that it's subject to the penalty of perjury, but I  
8 just let them talk as if it's a proffer.

9 MR. SUMPTER: Okay.

10 THE COURT: But when it comes to introducing other  
11 evidence as part of that testimony, the basic evidentiary rules  
12 apply.

13 MR. SUMPTER: Okay.

14 THE COURT: So that includes the rules that pertain  
15 to introducing exhibits. So before we get to the exhibit or  
16 the proposed exhibit, let me put you under oath.

17 MR. SUMPTER: Okay.

18 THE COURT: Would you raise your right hand, please?

19 MR. SUMPTER, SWORN

20 THE COURT: I'm going to consider what you're telling  
21 me your testimony.

22 MR. SUMPTER: All right.

23 THE COURT: The other side is entitled to object, you  
24 know, saying this isn't really evidence, etc. So now you want  
25 to introduce this email or these minutes?

1 MR. SUMPTER: Yes.

2 THE COURT: And can you identify them?

3 MR. SUMPTER: This is minutes that were from March 4,  
4 2009.

5 THE COURT: Okay.

6 MR. SUMPTER: And the subject was pension timing,  
7 attorney-client privilege, attorney-work product, confidential,  
8 do not forward.

9 THE COURT: Okay. And you should show a copy to the  
10 other side, unless you have it already.

11 MR. SUMPTER: That's my only copy, I was redacting  
12 last night.

13 MS. HAFLEY: We received documents from Mr. Gloster,  
14 Your Honor, but not any of the privileged documents, so we've  
15 not seen this document.

16 MR. SUMPTER: But you wouldn't have received that  
17 from --

18 MS. HAFLEY: That's right.

19 MR. SUMPTER: Oh, yeah, I don't think you received  
20 that from Mr. Gloster.

21 MS. HAFLEY: That's correct, I did not.

22 MR. SUMPTER: Because really, that was, I think that  
23 was attached to part of the minutes, so she wouldn't have  
24 received that.

25 THE COURT: So is there an objection to the admission

1 of this document?

2 MR. SENDEK: Well, I believe so, Your Honor, it is  
3 hearsay. I mean it seems rather inconsequential, but on the  
4 other hand, I don't want to open the door to introducing  
5 communication after communication that actually purports to be  
6 privileged in any event. But still, it's hearsay.

7 THE COURT: Can I take a look at it?

8 MR. SENDEK: Yes.

9 THE COURT: Okay, well it's a brief document. I'll  
10 not admit it -- hearsay means you're introducing something that  
11 someone else said for the truth of what they said.

12 MR. SUMPTER: Yes.

13 THE COURT: I'll not admit it for that because it is  
14 hearsay.

15 MR. SUMPTER: All right.

16 THE COURT: If you want to introduce it as for what  
17 you thought he was saying, how it affected you --

18 MR. SUMPTER: The point, the reason I wanted to  
19 introduce it was to show what the committee was thinking  
20 because that was what you had asked us about at the last  
21 hearing.

22 THE COURT: Okay. Well why don't you go ahead and  
23 I'll see if I'll admit it for any purpose.

24 MR. SUMPTER: Okay. So that was when the committee  
25 learned that the, we thought that the, there had been some

1 discussion that the termination of the pension was likely.  
2 Then they started questions on at that point would disability  
3 benefits be protected.

4 THE COURT: Okay. And so that email, I mean those  
5 minutes basically you say reflect your and other committee  
6 members' belief that the pension could well be terminated.

7 MR. SUMPTER: Yes.

8 THE COURT: All right. I'll admit it for that  
9 purpose.

10 MR. SUMPTER: And so when we go back to those  
11 documents that I, you know, I talked to Mr. Hogan about, one of  
12 the reasons that Mr. Gloster wrote that email was because of  
13 discussion in the committee about what was happening to  
14 disability benefits. And so, and then two days later after  
15 that we had reported in the minutes from Mr. Gloster what I,  
16 what I read was that Mr. Hogan said there was, they were only  
17 interested in terminating health care and life benefits as far  
18 as disability.

19 THE COURT: Well were you on the committee at that  
20 point?

21 MR. SUMPTER: Yes I was.

22 THE COURT: Okay.

23 MR. SUMPTER: I was on the committee up until the  
24 time that they I think it was probably around the 27th of March  
25 when they went, they scheduled a meeting to go and negotiate

1 their final payment terms, and I can, somewhere I have my --

2 THE COURT: No, that's okay. that's okay. I'm just  
3 trying to --

4 MR. SUMPTER: So the other part about this, you know,  
5 I pawned a kidney so I could pay to have the attorneys come  
6 here. Mr. Gloster refused to, Mr. Gloster, I don't have a real  
7 good relationship, but he refused to come. And I think it's  
8 outside the 100 mile --

9 THE COURT: Radius.

10 MR. SUMPTER: -- radius. He had some other reasons,  
11 like he thought I would subpoena --

12 THE COURT: Well he doesn't, I mean that's all he  
13 needs.

14 MR. SUMPTER: Right. I mean eventually I corrected  
15 his other impressions, but I understood about the 100 mile  
16 radius. So I agreed that I would call the server off, the  
17 server had been trying to serve him and he agreed to go ahead  
18 and send me the documents. And so, because I, you know, my  
19 impression is that the Court places a little bit higher level  
20 quality on the testimony from an officer from the Court than  
21 might be a person about myself, so I thought --

22 THE COURT: It all has to be true.

23 MR. SUMPTER: Well I understand that, but just like  
24 the reason you let Mr. Hogan testify via the telephone, I guess  
25 because he's an officer of the Court and --



1 THE COURT: Right.

2 MR. SUMPTER: -- there wasn't much issue about  
3 credibility or whatever. So I thought that having a different  
4 voice than mine wouldn't hurt, but he had access to the same  
5 minutes, except for he denies any memory or anything in our  
6 conversation. So, and I talked to Mr., I think his name is  
7 Cohen (phonetic) who has been generally helpful. He's the  
8 other attorney that the retirees hired. But he wasn't involved  
9 in that aspect of, his responsibility was more collecting the  
10 documents and searching them for that language and that kind of  
11 thing. He wasn't involved in the communication with Mr. Hogan  
12 and that kind of thing. And so he was willing to come, but he  
13 felt like everything he had was hearsay, and it would be  
14 objected to and so he didn't think it would serve me, it would  
15 just waste my money. He had been pretty helpful, I didn't  
16 think he would mislead me, so I pulled back the subpoena for  
17 him. But that's, what I was trying to do was answer what was  
18 the committee thinking --

19 THE COURT: Right.

20 MR. SUMPTER: -- as far as how we saw disability.  
21 And that's the background I have. We operated on that comment  
22 that I read where Mr. Gloster said and Mr. Hogan said that they  
23 weren't trying to terminate disability benefits, however, there  
24 hadn't been a specific question about that, our questions had  
25 centered on the pension, but that was something Mr. Gloster

1 asked as a part of that process, but that's what he reported  
2 back. There had not been a question about that raised in the  
3 committee, and I went through all the, I did all the searches,  
4 you know, I did a bunch of cross-searches and there was no  
5 other evidence of that. So that's what I have to say about  
6 what the committee thought and what it was working on. And our  
7 primary concern at that time was that Mr. Gloster communicated  
8 with Mr. Hogan was what would happen when the pension was  
9 terminated.

10 I have to make actually one accommodation if the  
11 Court permits it, is one of the challenges I have with my  
12 health is how it affects me and my ability to concentrate and  
13 remember. But, so I would ask you to I guess pay attention to  
14 my supplemental response because that's where I'm able to  
15 organize and keep things under control, where I might not be  
16 able to do it here.

17 THE COURT: Okay, I've certainly read that.

18 MR. SUMPTER: Okay. So the thing I'd like to do now  
19 is I guess go to Mr. Brooks.

20 THE COURT: Okay. Wait, let's have him sit up here.  
21 If you could just sit over here in the witness chair please.  
22 You can sit down. Would you raise your right hand please?

23 MR. JOHN BROOKS, SWORN

24 THE COURT: Could you spell your name for the record?

25 THE WITNESS: John Brooks.

1 THE COURT: B-R-O-O-K-S?

2 THE WITNESS: That's correct.

3 THE COURT: Okay, thanks.

4 MR. SUMPTER: Last May I was actually in the hospital  
5 and I had my right knee replaced. I'm going, I've got to give  
6 you a little background if that's okay, Your Honor. I got a  
7 call from David Miller, and this paper, I mean, in itself is  
8 not material other than it's a voicemail that my answering  
9 machine converts it into a text, and this is just an email from  
10 David Miller, a person who I didn't know, but he had been  
11 following the case on the docket.

12 MR. SENDEK: Can we see it, please?

13 MR. SUMPTER: I'm sorry.

14 MR. SENDEK: Thank you, Mr. Sumpter.

15 THE WITNESS: May I retrieve my glasses?

16 THE COURT: Yes.

17 MR. SENDEK: Your Honor, it purports to be a May 19,  
18 2012 communication. I'm not entirely sure who it's from. It's  
19 rather garbled, but I do, I object to the --

20 THE COURT: Well, I don't think he actually  
21 introduced this. This is just context for your question?

22 MR. SUMPTER: Yes.

23 THE COURT: Okay.

24 MR. SENDEK: Well, I was going to object to him  
25 cross-examining the witness on something that apparently --

1 THE COURT: Right. Well we'll see where it goes.

2 MR. SUMPTER: I was just trying to establish why,  
3 I'll still let him see it, Mr. Brooks see it. But anyway, so I  
4 communicated with Mr. Miller on the telephone and he told me he  
5 was receiving supplemental extended disability benefits also.  
6 And I understand that he signed --

7 MR. SENDEK: Objection, Your Honor. I mean we're  
8 going too far now.

9 THE COURT: Well, you should ask -- this is  
10 examination of Mr. Brooks.

11 MR. SUMPTER: Okay.

12 THE COURT: You need to ask him a question, and this  
13 is really not your testimony.

14 MR. SUMPTER: I'm sorry. All right.

15 BY MR. SUMPTER:

16 Q. Mr. Brooks, I tried to serve you a subpoena for documents  
17 concerning David Miller. And the best information I had was  
18 his last known address is what I put on the subpoena. And one  
19 of the things I asked for was his pay records. And I didn't  
20 receive any such document, I got this document from Ms. Haffey.  
21 Do you not have pay records for Mr. Miller?

22 A. Mr. Miller is not a DPH employee, so I have no records for  
23 Mr. Miller. He never was a DPH employee. He was terminated  
24 at, from DPH October 6th, 2009.

25 Q. He was terminated from DPH or Delphi?

1 A. He was terminated from DPH, he became a new Delphi  
2 employee October 6th, 2009.

3 Q. So was he working on October 6th, 2009?

4 A. I believe he was on short-term disability, and as such  
5 transferred to the new Delphi organization.

6 Q. He transferred, he requested a transfer?

7 A. No, he was terminated, and rehired by new Delphi.

8 Q. While on disability?

9 A. Short term.

10 Q. That seems to be an unusual thing that you would hire  
11 someone who is disabled.

12 A. I can explain to you how it was explained to me, but this  
13 is hearsay.

14 THE COURT: If no one objects, you can say it.

15 THE WITNESS: As it was explained to me, the  
16 individuals that were on short term disability as of emergence  
17 were assumed into the new Delphi organization to protect them  
18 from a job standpoint. If they were on pregnancy leave, which  
19 is the majority of the short term disability, they would then  
20 when they returned from their short term disability, they would  
21 then have a job for them in the new Delphi organization.  
22 Individuals that were on long term disability as of October 6th  
23 remained with the reorganized debtors. Individuals on short  
24 term disability were terminated from the reorganized debtors  
25 and hired by new Delphi. And that's the case with Mr. Miller.

1 MR. SUMPTER: I don't have any other questions.

2 THE COURT: Okay. Any cross?

3 MR. SENDEK: Nothing here, Your Honor.

4 THE COURT: Okay, you can step down sir.

5 MR. SUMPTER: The machinations I'll describe is what  
6 happens in bankruptcy is kind of interesting sometimes, but Mr.  
7 Miller received a termination letter, that's what he told me  
8 anyway. This will be my testimony unless you object that --

9 MR. SENDEK: Mr. Sumpter, the Court -- I'm sorry,  
10 Your Honor, I should address the Court. I will object if he  
11 goes beyond that. I mean we've heard that he received a  
12 termination, that's fine, but beyond that, I think it's all  
13 hearsay what Mr. Miller might say or could say.

14 THE COURT: Okay. Well, I don't know what else  
15 you're going to offer besides the fact that he was terminated.

16 MR. SUMPTER: I'm sorry?

17 THE COURT: I don't know what else you're going to  
18 offer besides the fact that he was terminated.

19 MR. SUMPTER: Well I had, the other things that he  
20 told me, but --

21 THE COURT: He's not here to testify and to be cross-  
22 examined.

23 MR. SUMPTER: In fact, I had trouble locating Mr.  
24 Miller, I had trouble locating him, his phone number was --

25 THE COURT: It doesn't matter, he's just not here to

1 testify.

2 MR. SUMPTER: I understand.

3 THE COURT: What he told you really --

4 MR. SUMPTER: I was just going to offer that I  
5 finally made contact with him this morning, that was all I was  
6 going to offer.

7 THE COURT: Okay.

8 MR. SUMPTER: So I don't have any more regarding him  
9 because I couldn't locate him until --

10 THE COURT: Recently.

11 MR. SUMPTER: Yeah. So, well that's essentially, I  
12 believe that I offered information on what the committee  
13 thought, I believe that we go back and I'll find that specific  
14 reference to Mr. Gebbias's declaration that was fairly explicit  
15 about what OPEB benefits cover, and then we also talked about  
16 what was stated in the OPEB motion. And I made in my  
17 supplemental response and I offered case law that I said  
18 existed on the benefits on the claim were vested, and I  
19 couldn't be retroactively terminated. And so I think in  
20 essence I believe the benefits were not terminated by your  
21 order. I also believe they were vested, and that they were  
22 wrongly terminated, and that's the foundation of all my  
23 complaints. So that, if for example, the Court rules against  
24 me, all my complaints evaporate. I mean whether you go to the  
25 collateral estoppel issue or not.

1 THE COURT: Okay.

2 MR. SUMPTER: As far as the collateral estoppel  
3 issue, I think that the reference that Ms. Haffey or whoever  
4 wrote that, raised, would only apply if disability, potentially  
5 apply if disability benefits had been terminated in 2009, you  
6 know, in your 2009 order. Absent that, I don't see how it can  
7 apply.

8 THE COURT: Okay. Okay. Anything in rebuttal?

9 MR. SENDEK: We won't have any cross, Your Honor.

10 THE COURT: Okay. Do you have any further oral  
11 argument, or are you going to rest on the papers?

12 MR. SENDEK: Other than just to state, Your Honor,  
13 that, and I'll refer the Court back to the transcript cites  
14 that I mentioned earlier in regards to paragraph 4, there  
15 really can't be any question that the cites that I provided to  
16 the Court are accurate, and Mr. Butler read into the record on  
17 page 52, the exact wording of paragraph 4 and referred to as  
18 conversation in the February 24th hearing with Mr. Rosenberg.  
19 So, that's the only further response.

20 THE COURT: Okay. All right. I have before me a  
21 motion by DPH Holdings Corp. to enjoin Mr. Sumpter from  
22 pursuing a lawsuit that's pending in the District Court,  
23 Southern District of Indiana, that seeks to enforce claims  
24 against DPH and certain of its officers and counsel under  
25 various theories that all in essence go to Mr. Sumpter's



1 contention that in March of 2012 DPH or the reorganized debtors  
2 terminated his remaining benefits provided under the benefit  
3 plans maintained by the reorganized debtors or DPH's  
4 predecessor, Delphi Corporation.

5 More specifically, the complaint in the Indiana  
6 action complains about the termination, or the wrongful  
7 termination, of benefits under the Delphi Salaried Life and  
8 Disability Benefits Program applicable to him. The motion  
9 contends that Mr. Sumpter is precluded by the confirmed plan in  
10 this case and the plan modification order--the order that in  
11 effect confirmed that plan, from July of 2009--as well as an  
12 order issued by the Court on March 3rd, I'm sorry, March 11th,  
13 2009 granting the debtors' motion for leave to terminate their  
14 so-called OPEB or salaried OPEB obligations and plans for  
15 eligible salaried retirees.

16 I held a hearing on this motion, which was a non-  
17 evidentiary hearing, last month and concluded that I should  
18 take evidence on what was intended to be covered by the  
19 salaried OPEB motion in 2009, and, accordingly, the Court's  
20 order on March 11th, 2009. I've today held that hearing as  
21 well as received and reviewed supplemental briefing by both DPH  
22 and Mr. Sumpter.

23 I've concluded that I have jurisdiction over this  
24 dispute notwithstanding that the motion was filed years after  
25 confirmation of Delphi's chapter 11 plan. That is because the

1 plan and the order confirming the plan expressly provided that  
2 the Court retained exclusive jurisdiction of all matters  
3 arising out of and related to the chapter 11 cases and this  
4 plan including any dispute relating to any liability arising  
5 out of the termination of any employee or retiree benefit  
6 program regardless of whether such termination occurred prior  
7 to or after the effective date. Modified Plan section 13(p).  
8 In addition, this dispute implicates a core function under the  
9 Bankruptcy Code, namely not only the Court's enforcement of the  
10 confirmation order, but also the injunction issued by the Court  
11 in furtherance of the plan injunction and exculpation  
12 provisions found in sections 11.2 and 11.11 of the plan.  
13 There's no more central feature to post-confirmation  
14 jurisdiction than enforcing the confirmation order and, more  
15 specifically, the plan's and the confirmation order's  
16 provisions enjoining and channeling litigation from other  
17 forums to the Bankruptcy Court forum. See *in re Texaco Inc.*  
18 505 Fed. Appx. 77 (2d Cir. 2012) at 78 - 79.

19 As narrowed at the September 20, 2013 hearing and  
20 further as the subject of this hearing, the dispute here hinges  
21 on whether the Court's prior orders, which I've referred to,  
22 starting with the final OPEB order of March 11th, 2009 and then  
23 going to the July 2009 plan modification or confirmation order,  
24 in fact are binding on the parties with respect to the  
25 termination in March 2012 of Mr. Sumpter's disability benefits.

1 The motion granted by the final OPEB order sought an order  
2 confirming the debtors' authority to terminate employer paid  
3 post-retirement health care benefits and employer-paid post  
4 retirement life insurance benefits for certain salaried  
5 employees and retirees and their surviving spouses. That so-  
6 called salaried OPEB motion is obviously part of the record in  
7 this case; it's dated February 4th, 2009. On its face, and  
8 more specifically in footnote 3 of that motion, the debtors  
9 argued that the plan, the welfare plan under which Mr. Sumpter  
10 until March of 2012 received disability benefits, as well as  
11 other welfare plans maintained by Delphi, contained language  
12 that specifically reserved to Delphi the right to amend,  
13 modify, suspend or terminate the program in whole or in part at  
14 any time by action of its board of directors or other  
15 individual or committee expressly authorized by the board to  
16 take such action. Delphi contended in the salaried OPEB motion  
17 that this language enabled it to terminate the plans described  
18 in the motion notwithstanding sections 1114 and 1129(a)(13) of  
19 the Bankruptcy Code. I concluded after three days of hearings  
20 that Delphi was correct. So there's no question that I  
21 authorized Delphi in the order granting that motion to  
22 terminate the benefit plans referred to in the motion insofar  
23 as the motion sought such termination.

24 DPH has contended that it is the case that Delphi and  
25 the other parties and the Court understood that included within

1 the benefit programs or plans covered by the motion was Mr.  
2 Sumpter's disability right or rights. Mr. Sumpter contends, to  
3 the contrary, that the final OPEB, I'm sorry, the salaried  
4 employees' OPEB motion sought only the termination of a portion  
5 of his rights under the Delphi Salaried Life and Disability  
6 Benefits Program, i.e., his health benefits as a person covered  
7 by that program in respect of his disability, and his life  
8 insurance benefits, and potentially other benefits, but,  
9 importantly, not the disability benefit payments on account of  
10 his disability that were terminated in March of 2012.

11 The motion itself is not entirely clear on this  
12 point, but I believe that a better reading of the motion is  
13 that the motion did not seek authority to terminate the entire  
14 Delphi Salaried Life and Disability Benefits Program insofar as  
15 it applied to salaried retirees, but rather to the several  
16 categories of salaried OPEB listed on page one of the motion,  
17 i.e., eligibility for employer paid post-retirement health care  
18 benefits for all current and active salaried employees, company  
19 contributions to provide post-retirement health care for  
20 current and future salaried retirees and their surviving  
21 spouses, cancellation of all retiree health reimbursement  
22 accounts, Medicare eligible salaried retirees and their  
23 surviving spouses, termination of Medicare, Part B special  
24 benefit for current and future salaried retirees and their  
25 surviving spouses, the cessation of the one percent employer

1 contribution to the salaried retirement savings program for  
2 those active salaried employees hired on or after January 1,  
3 1993 and on or prior to December 31, 2000, the elimination of  
4 eligibility for employer paid post-retirement basic life  
5 insurance benefits for all current and future active salaried  
6 employees, and the cessation of making company contributions to  
7 provide post-retirement basic life insurance benefits for  
8 current and future salaried retirees, as again listed on page  
9 two of the motion. A similar list appears in the final OPEB  
10 order.

11 I believe this is consistent also with the  
12 termination letter that Delphi sent out on February 5th, 2009,  
13 which appears as an exhibit to DPH's supplemental memorandum  
14 submitted in connection with this motion, which notifies Delphi  
15 Health and Life Program participants of Delphi's intention to  
16 terminate certain benefits, which include health care coverages  
17 and life insurance coverages, but does not reference all  
18 disability benefits, including as is relevant here, disability  
19 payments not for health coverage, but literally for any  
20 disability under the disability and life insurance plan.

21 That, however, is not the end of the issue, because,  
22 to reach that result, the Court and the parties considered  
23 necessarily whether there was any vesting by any participant in  
24 the Delphi Salaried Life and Disability Benefits Program that  
25 would not be trumped by the reservation language that I

1 previously quoted permitting the corporation to terminate in  
2 whole or in part the policies.

3 Many retirees and those on disability as well as  
4 active salaried employees objected to the salaried OPEB motion.  
5 The Court held an initial hearing on the motion and those  
6 objections on February 24, 2009. There are numerous references  
7 in that hearing transcript to issues as to whether,  
8 notwithstanding the general reservation that I quoted, various  
9 salaried employees, retirees or those on disability had in fact  
10 vested rights in the plan which precluded the relief that  
11 Delphi was seeking. Concerned about those arguments, the Court  
12 appointed, notwithstanding its preliminary view that Delphi  
13 would prevail, an official committee of retirees under section  
14 1114 of the Bankruptcy Code; and it charged that committee with  
15 the task on behalf of all retirees, including those on  
16 disability, of making the case as to whether any retirees--  
17 including specifically, as based on the February 24th hearing  
18 transcript, those on disability--had any vested rights that  
19 would preclude the relief that Delphi was seeking or, more  
20 broadly, create a vested right by those retirees. The  
21 references to that issue are set forth, and are accurately set  
22 forth, I believe, in DPH's supplemental memorandum.

23 The committee did its analysis and presented it to  
24 the Court on March 10th and March 11th, 2013. Again, the  
25 subject of the rights of former employees who are on disability

1 came up a number of times at that hearing, and those times are  
2 accurately set forth, again, in Delphi's supplemental  
3 memorandum. No evidence was found by the Court to establish  
4 any vesting rights unique to those on disability, as concluded  
5 by the Court in its bench ruling and also as summarized by  
6 Delphi's counsel at that hearing. If there had been any unique  
7 vesting right for any disabled party, including Mr. Sumpter,  
8 the Court would not have granted the relief it did, which  
9 included terminating medical and life insurance benefits that  
10 had been triggered by disability of such people.

11 Clearly the issue of vesting was actually litigated  
12 as set forth in the transcript of the March 10th and 11th  
13 hearing and as contemplated by the Court when it gave only a  
14 preliminary ruling on February 24th, 2009, and when it  
15 appointed the retiree committee to represent all the retirees  
16 in respect of the vesting issue. I believe that was clear also  
17 to the retiree committee, which, as I believe I can conclude  
18 from Mr. Hogan's testimony today, was concerned after the  
19 issuance of the final OPEB order, on March 11th, 2009, that,  
20 given the Court's ruling, Delphi was free to terminate all  
21 retiree benefits, not just medical and life insurance. This is  
22 a, was a, perfectly logical reading by the committee given,  
23 again, the nature of the analysis set out in the March hearing.

24 Ultimately, those issues I believe were in fact  
25 settled by the settlement between Delphi and the retiree

1 committee which I previously approved by final order. That  
2 settlement set up a hardship fund as well as a VEBA to provide  
3 material consideration to retirees, including those on  
4 disability. I do not believe that Delphi ever committed not to  
5 terminate disability benefits in any respect. Such a  
6 commitment would require Court approval, and it's obviously  
7 clearly inconsistent with the settlement that I've just  
8 discussed, which says nothing about any such commitment, as  
9 well as the Court's ruling on the salaried OPEB motion.

10 I conclude, therefore, that while the final OPEB  
11 order is not res judicata for reasons that I've already stated  
12 as well as my belief in reviewing Mr. Sumpter's objection to  
13 the OPEB motion that Mr. Sumpter was objecting to the  
14 termination of his retiree, I mean his disability, health and  
15 life insurance benefits, that, again, while res judicata does  
16 not apply here, collateral estoppel does. New York preclusion  
17 law applies here, and under that law, re-litigation of an  
18 issue, or collateral estoppel, is precluded when two conditions  
19 are met: the identical issue necessarily was decided in the  
20 prior action and is decisive in the present action, and the  
21 party to be precluded from litigating the issue had a full and  
22 fair opportunity to litigate the issue in the prior action.  
23 See Kaufman v. Eli Lilly & Co. 4 A2d 63, 67 (NY Court of  
24 Appeals 1985). See also Khandahr, K-H-A-N-D-A-H-R, v.  
25 Elfenbein, 943 F.2d 244, 247 (2d Cir. 1991).



1 Here, obviously, Mr. Sumpter was a party to the OPEB  
2 motion and had a full and fair opportunity to litigate the  
3 issue. Not only was he a party, he was also a member, until  
4 well after the issuance of the final OPEB order as well as  
5 before the March 10th and 11th hearing, of the retiree  
6 committee which obviously was charged with taking the laboring  
7 oar on behalf of the objectants after it was appointed.

8 I believe that the issue of termination rights for  
9 those on disability was directly before the Court and actually  
10 decided in order to decide the OPEB motion and that, therefore,  
11 it is binding--that decision is now binding on Mr. Sumpter when  
12 he is quite candidly again alleging that it was the wrongful  
13 termination of his disability benefits that gives rise to his  
14 claims, in the Indiana District Court action and does include  
15 all his claims, whether they be a breach of fiduciary duty,  
16 breach of contract or other violations of ERISA. They all flow  
17 from whether in fact the reorganized debtors had, or DPH had  
18 the authority in March of 2012 to terminate his retiree  
19 benefits. The same authority that applied to the final OPEB  
20 motion necessarily applies to that termination in March of  
21 2012.

22 The right to disability health care and disability  
23 life based on the triggering event of one's disability is no  
24 different than the right to disability payments triggered by  
25 one's disability. In respect of the former issue, the retiree

1 committee argued to the contrary before me on March 10th and  
2 11th, 2009. I disagreed with them, relying primarily on the  
3 Sixth Circuit's Sprague (phonetic) decision, which I cited.  
4 Mr. Sumpter in his supplemental memorandum as well, as I'm sure  
5 he would similarly argue in the Indiana District Court, makes  
6 the same argument that the retiree committee made, which is  
7 that vesting for disability is somehow different than vesting  
8 under a welfare plan for other rights. In his case, he's  
9 arguing for disability payments; they were arguing for  
10 disability medical insurance and life insurance. In each case,  
11 though, the same principle applies, which is that where there  
12 is explicit language to the contrary, and here that is the  
13 unfettered right to terminate disability benefits, a benefit  
14 may in fact be terminated even for those who are already  
15 disabled.

16 This principle was recently confirmed in the Sixth  
17 circuit in Price v. Board of Trustees of the Indiana Labor  
18 Pension Fund, 707 F.3d, 647, 651 (6th Cir. 2013), reh'g denied,  
19 2013 U.S. LEXIS 8400 (6th Cir. 2013), in which the Sixth  
20 Circuit said that a welfare benefit plan may be terminated at  
21 any time so long as the termination is consistent with the  
22 terms of the plan, including in respect of disability payments  
23 for beneficiaries of the plan who are already disabled and  
24 receiving such payments. See also Robinson v. Sheet Metal  
25 Workers National Pension Fund, 515 F.3d 93, 98-99 (2nd Cir.

1 2008), cert. denied 2008 U.S. LEXIS 5643 (October 6th, 2008).  
2 Accordingly, Mr. Sumpter is collaterally estopped from  
3 proceeding with his claims based upon the alleged improper  
4 termination of his retiree benefits.

5 I had also asked the parties to brief whether that  
6 collateral estoppel was sufficient for the Court to enforce the  
7 injunction under the plan, which is a slightly different issue  
8 than whether the Court has jurisdiction, which I've already  
9 concluded I have.

10 I conclude, given the plan language that I previously  
11 quoted from section 13(p) of the plan as well as the plan  
12 modification order injunction and the injunction in the plan at  
13 11.2 and 11.11 of the plan, that I in fact should enjoin Mr.  
14 Sumpter's pursuit in contravention of those provisions, of the  
15 Indiana District Court action based upon collateral estoppel.  
16 In that sense, this case is closely analogous to Monarch Life  
17 Insurance Company v. Ropes & Gray, 65 F.3d 973, (1st Cir.  
18 1995). The Court clearly had determined in March of 2009 that  
19 the debtors had the right under the applicable welfare plan  
20 document to terminate any of the retiree benefits. That issue  
21 had been actually litigated, the retiree committee having been  
22 created and empowered to do so. The chapter 11 plan set up DPH  
23 with the clear understanding that it would have a finite life  
24 to administer that plan and eventually go out of existence when  
25 the case is closed. It apparently delayed termination of all

1 retiree benefits for three years after the Court's 2009 ruling,  
2 and I believe that it is terminating those benefits or did  
3 terminate them in 2012 with the eye to actually wrapping up the  
4 estate rather than continuing to administer the plan when it  
5 was not required to do so thereafter. The bankruptcy plan and  
6 confirmation order contemplated that type of determination when  
7 it referred to not interfering by asserting a claim against DPH  
8 and its agents in respect to the benefit plans "whether  
9 terminated now or in the future." And it is clear that that  
10 was because of the limited life of the DPH entity and the fact  
11 that the Court had already determined this issue.

12 Consequently, I believe that it is proper for me to  
13 grant the motion in furtherance of the injunctions provided for  
14 in the plan and the order confirming the plan. I also find and  
15 conclude that in addition to there being no evidence showing  
16 that Delphi ever agreed not to terminate any benefits covered  
17 by this plan, including disability benefits, it specifically  
18 did not do so in paragraph 4 of the final OPEB order. I  
19 believe that order is in fact clear that until termination  
20 Delphi will continue to honor the benefit plans, including the  
21 disability plan, and that no claim need be filed for amounts  
22 owing thereunder. But the key caveat is "until termination."  
23 This is made clear by the transcript references in the February  
24 24th, 2009 and March 11th, 2009 hearings where, at page 100 of  
25 the February 24th hearing transcript and page 52 of the March

1 11th transcript, the counsel for the official unsecured  
2 creditors committee first proposed that while the benefits were  
3 still in effect, i.e., while they had not yet been terminated,  
4 beneficiaries would not have to file a claim for them to the  
5 extent that they had already been earned, for example by visits  
6 to the doctor, and the statement at page 52 of the March 11th  
7 transcript by the debtors' counsel, Mr. Butler, confirming that  
8 paragraph 4 was being added to the proposed OPEB order in  
9 response to that point made by Mr. Rosenberg on behalf of the  
10 official unsecured committee. It's certainly consistent with  
11 the Court's ruling, which is that the reservation language in  
12 the applicable plans, including the plan that Mr. Sumpter is  
13 suing under now, permitted termination and that there was no  
14 separate vesting language as had existed for example in the  
15 cases that he has cited, including Pfeifer v. Prudential  
16 Insurance Company of America, 306 F.3d 1202, 1212 (2nd Cir.  
17 2002) and as was referenced in, as a possibility, in Childs v.  
18 Ceridian Corp. 95 F.3d 1505 (10th Cir. 1996). I would not have  
19 taken away in paragraph 4 of the final OPEB order the relief  
20 that I had already found Delphi had a right to under that  
21 reservation language.

22 So I will grant the motion by DPH and enjoin Mr.  
23 Sumpter from pursuing the Indiana action against DPH or any of  
24 its officers and agents, including its counsel, who are also  
25 named defendants. I had previously ruled in September that the

1 other claim in that action, which was based on a different  
2 theory premised upon a pre-confirmation and in fact arguably  
3 prepetition, claim was separately barred by the plan  
4 modification order and the discharge injunction.

5 One last point. It is clear that Mr. Sumpter has  
6 been paid all of the accrued disability up to the date of the  
7 termination in March of 2012. He seeks only forward-going  
8 disability payments. Given my ruling in 2009, which I've  
9 reconfirmed just now, Delphi had an absolute right to terminate  
10 those benefits and therefore there would be no claim for them,  
11 even a claim under paragraph 4 of the final OPEB order. So,  
12 Ms. Haffey, you can email chambers that order.

13 MS. HAFHEY: I will. Thank you, Your Honor.

14 THE COURT: All right. Thank you.

15 (Hearing Adjourned 12:41 PM)

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I N D E X

RULINGS

DESCRIPTION

PAGE

HEARING re 22189: GM Cross Motion to Adjourn

15

HEARING re 22075: Reorganized Debtors'

Motion for an Order to Compel Compliance

with, and to Implement, the Modified Plan,

Plan Modification Order and Related Documents

15

HEARING re Motion to Disallow Claims

Reorganized Debtors Motion for Order (1)

Enforcing Modification Procedures Order,

Modified Plan and Plan Modification Order

Injunction Against Curtis J. Duxbury and Carol

Duxbury, as Plaintiffs, in New York State

Court Personal Injury Action; and (II) Directing

Curtis Duxbury and Carol Duxbury to Dismiss

Action to Recover Upon Discharged and Expunged

Claim ("Duxbury Injunction Motion")

15

HEARING re Motion for Order (I) Enforcing

(A) Modified Plan and Plan Modification

Order Injunctions, (B) OPEB Orders, and

(C) Recoupment Order; (II) Enjoining James  
Sumpter's Second Lawsuit Filed in the USDC  
for the Southern District of Indiana and  
Requiring James Sumpter to Dismiss the  
Indiana Action with Prejudice; and (III)  
Holding James Sumpter in Contempt and  
Awarding Other Sanctions.

77



CERTIFICATION

I, Theresa Pullan, certify that the foregoing is a  
correct transcript from the official electronic sound recording  
of the proceedings in the above-entitled matter.

Theresa  
Pullan

Digitally signed by Theresa Pullan  
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